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In the Supreme Court of the United States

U.S. Supreme Court
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U.S. 835

Total Taxation

First 100,000 Dollars of Income
Payable in the form of a
Warrant for the
Payment of the same



Subject Index

	Page
Preliminary statement	1
The ownership doctrine is applicable in this case	3
Fishing is not a common occupation	15
Petitioner has no "right" to earn his living by commercial fishing in California	18
Section 990 of the Fish and Game Code is supportable as a conservation measure	21
Section 990 of the Fish and Game Code is not repugnant to standards established between the United States and other nations	34
Conclusion.....	36

Table of Authorities Cited

Cases	Pages
American Mfg. Co. v. St. Louis, 250 U. S. 459	33
Atlantic Coastline Ry. Co. v. Georgia, 234 U. S. 280	34
Bayside Fish Flour Company v. Gentry, 297 U. S. 422....4, 12,	35
Berry v. Chaplin, 74 Cal. App. (2d) 889	26
Brown v. Superior Court, 10 Cal. App. (2d) 365.....	2
Donohoe Co. v. Superior Court, 79 Cal. App. 41.....	2
Ex parte Gilletti, 70 So. 446, 70 Fla. 442	17
Foster Fountain Packing Co. v. Haydel, 278 U. S. 1	19
Hellmich v. Hellman, 276 U. S. 233	27
Hendrickson v. Apperson, 245 U. S. 195	34
International Harvester Co. v. Wisconsin, 322 U. S. 435....	32
International Paper Co. v. Massachusetts, 246 U. S. 135...?	34
Korematsu v. United States, 323 U. S. 214	21
LaCoste v. Department of Conservation, 263 U. S. 545	4
Lubetich v. Pollock, 6 Fed. (2d) 237	14
Mackay Tel. & Cable Co. v. Little Rock, 250 U. S. 94	34
Manchester v. Massachusetts, 139 U. S. 240	35
McClatchy v. Matthews, 135 Cal. 274	2
Mirkovich v. Milnor, 34 Fed. Supp. 409	12
Morehead v. New York, 298 U. S. 587	32
Pacific Livestock etc. v. Lewis, 241 U. S. 440	34
Patson v. Pennsylvania, 232 U. S. 138	20
Pavel v. Pattison, 24 Fed. Supp. 915	19
Plum v. State Board of Control, 51 Cal. App. (2d) 382, 124 Pac. (2d) 891	27
Price v. Illinois, 238 U. S. 446	34
Prince v. Mace, 321 U. S. 158	23
Robinson v. Mitchell, 159 Cal. 581	27

TABLE OF AUTHORITIES CITED

iii

	Pages
Santa Cruz Oil Corp. v. Milnor, 55 Cal. App. (2d) 56.....	13
Skiriotes v. Florida, 313 U. S. 69	20, 35
Supreme Lodge etc. v. Meyer, 265 U. S. 30	32
S. R. A. Inc. v. Minn., 327 U. S. 558	32
The Abby Dodge, 223 U. S. 166	35
Thomson v. Dana, 52 Fed. (2d) 759, aff. 285 U. S. 529.....	34
Truax v. Raich, 239 U. S. 33	17, 18
United States v. California, 332 U. S. 19	35
Van Camp Sea Food Co. v. Department of Natural Resources, 30 Fed. (2d) 111	13
Vanderbush v. Board of Public Works, 62 Cal. App. 771....	2
Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651.....	34

Codes

Fish and Game Code:

Sections 427 and 428	26
Section 725	16
Section 990	21, 26

Statutes

Revised Statutes of the United States, Title XXXII, Chap. VI, section 2319 (30 U.S.C.A., sec. 22)	17
---	----

Texts

10 Calif. Juris. 693, section 21	26
--	----

Encyclopedias

Encyclopaedia of Social Science, Volume III, page 266	15
--	----

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1947

No. 533

TORAO TAKAHASHI,

Petitioner,

vs.

FISH AND GAME COMMISSION, LEE F.
PAYNE, as Chairman thereof, W. B.
WILLIAMS, HARVEY E. HASTAIN, and
WILLIAM SILVA, as members thereof,
Respondents.

On Writ of Certiorari to the Supreme Court of the
State of California.

BRIEF FOR RESPONDENTS.

PRELIMINARY STATEMENT.

We have read petitioner's brief of March 31, 1948, with some misgiving as it impresses us as a *potpourri* of contradiction and overstatement. For example, as shown hereinbelow, the petitioner claims in his brief he intends to fish on the high seas exclusively and in

the very next breath virtually concedes that at least some of his fishing must be done in territorial waters and that he, along with other fishermen, pay little attention to the imaginary three-mile ocean boundary line of California.

It should be noted that this case was submitted to the trial Court for decision without any proof from the petitioner in support of the allegations of his petition. For example, he alleged that section 990 of the Fish and Game Code is unconstitutional because "enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race" (R. 2). He also alleged that respondents "refuse to issue a commercial fishing license to petitioner solely because of his Japanese ancestry" (R. 2). The substance of the latter allegation is stated as a fact at page 4 of petitioner's brief. Such a statement, of course, is erroneous. Respondents will issue a license to an alien Japanese if he is eligible to citizenship. All these allegations were denied by respondents in their answer and, as petitioner offered no proof to support his position, the answer must be taken as true (*McClatchy v. Matthews*, 135 Cal. 274; *Vanderbush v. Board of Public Works*, 62 Cal. App. 771; *Donohoe Co. v. Superior Court*, 79 Cal. App. 41; *Brown v. Superior Court*, 10 Cal. App. (2d) 365).

Apparently the petitioner has realized that his failure to offer proof has placed him in an embarrassing position. For ever since the cause was submitted to the Supreme Court of California he has made a de-

terminated effort to inject into the record *arguendo* certain data, largely conclusions of counsel, which would be inadmissible if offered in the trial Court. Petitioner's current brief shows he is still pursuing the same course.

The petitioner attempts to prove on appeal a belief that alien Japanese were the only persons ineligible to citizenship who ever fished in California or out of California ports. This is a hypothesis which he not only failed to prove in the trial Court but also failed to allege. His action in this respect is a radical departure from the previously announced purpose of both sides¹ to settle the question as to the power of the State to preclude ineligible aliens from fishing. If indeed Mr. Takahashi is interested in such a determination it matters not whether he is Japanese, Malayan, Burmese, Javanese or racially a member of some other group ineligible to citizenship. It now appears, however, that he is concerned solely with himself as an alien Japanese and raises the hue and cry of racism and "war-born anti-Japanese prejudice" (brief, page 9) and similar expressions as a means to an end.

THE OWNERSHIP DOCTRINE IS APPLICABLE TO THIS CASE

The petitioner seeks to avoid the impact of what might be termed the ownership doctrine (pages 13 and 14 of his brief) by contending that the doctrine

¹Appellants' Opening Brief and Respondent's Brief in the Supreme Court of California, pages 35 and 1 respectively.

4

has no application to him because he "seeks to fish on the high seas and not in any area where the State of California can properly claim a proprietary interest * * *" (brief, page 17).

This doctrine of sovereign ownership is succinctly stated in *LaCoste v. Department of Conservation*, 263 U.S. 545, viz.:

"The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use, and property rights that may be acquired therein."

This doctrine is too firmly established throughout the nation to admit further controversy and it has been extended to fish brought ashore from the high seas (see cases cited at page 27, respondents' brief in opposition to petition for writ of certiorari). As said in *Bayside Fish Flour Company v. Gentry*, 297 U.S. 422 at page 426, the rule is justified upon the ground

"* * * that it operates as a shield against the covert depletion of the local supply * * *"

This brings us to the very serious question as to the true intent and purpose of Mr. Takahashi with respect to California's "local supply" of fish. Apparently he concedes that California may classify aliens into two groups (eligibles and ineligibles) with respect to the fish over which sovereign ownership ex-

tends. At least the trial Court so held. Where, then, does Mr. Takahashi propose to do his fishing?

At the bottom of page 7 of his brief, he claims the "right to fish in the ocean". At page 8 he says he "seeks to fish in the open sea". At page 11 he expresses a desire to fish "in the open ocean". Such statements are not helpful.

At page 10 of his brief he makes "no claim to take fish in which the State of California has or rightly can claim a proprietary interest". At page 17 he states he "seeks to fish on the high seas and not in any area where the State of California can properly claim a proprietary interest in the fishery resources * * *". Here we find the first clear statement that petitioner proposes to fish the high seas exclusively. However, that statement seems to be contrary to other statements in the brief. For example, at page 11 petitioner states that the "law" told him he could not fish "within three miles of the California coast" and so "he was cut off from his occupation". Again at pages 11 and 12, it is said "that the petitioner and the other alien Japanese fishermen * * * earned their living from a fishery only a portion of which * * * lies within three miles of the shore." Such assertions flatly contradict his amended pleading that he fished the high seas exclusively since 1915. In the light of such statements can it truthfully be said that Mr. Takahashi proposes to fish the high seas only?

But actions speak louder than words. The record clearly shows that Mr. Takahashi intends to fish in

territorial waters as well as on the high seas. The trial Court granted him a judgment directing respondents to issue him a license to engage in fishing on the high seas (R. 7). He was not satisfied with that. He subsequently made an *ex parte* motion to the trial Court for an amended judgment directing the issuance of a commercial fishing license without qualification as to the place of use (R. 21). The action of the petitioner in such respect manifests his intention to fish in territorial waters as well as on the high seas. Moreover, the supplemental pleading in the companion case of *Tsuehyama v. Fish and Game Commission* demonstrates the impossibility and impracticability of limiting commercial fishing activities to territorial waters alone. This pleading was signed by A. L. Wirin, Esq., counsel for petitioner herein, and reads in part as follows:

"It is impossible, and, in any event, impractical for the plaintiff to determine, while engaged in commercial fishing for sardines, where the dividing line between the so-called 'high seas' and the so-called 'territorial waters' are or may be.

"From 1925 until 1942, while engaged in commercial fishing, under licenses issued by the Fish and Game Commission during the sardine season, the plaintiff has engaged in fishing said sardines both from high seas and the territorial waters of the ocean.

"Unless permitted to fish for sardines, not only on the high seas but in the territorial waters, the plaintiff would be unable to fish effectually and efficiently for sardines, and would be de-

7

prived of the right to earn a livelihood as a commercial fisherman in the occupation followed by him since 1925.

"The foregoing applies to, and is true of, all of the Japanese fishermen in whose behalf this Complaint is filed as listed in Exhibit A attached to said Complaint, except only that each of said persons has engaged in commercial fishing heretofore, under commercial fishing licenses issued by said Commission, for varying periods.

"Wherefore, the plaintiff prays that the defendants be enjoined as prayed for in said Complaint on file herein and that the defendants be additionally restrained from interfering with the right of the plaintiff, and with the right of the persons named in Exhibit A, attached to said Complaint, to engage in commercial fishing and to bring fish caught on the high seas or in the territorial waters of the ocean, in a fresh state, ashore to any point in the State of California.

A. L. WIRIN and JOHN MAENO

By A. L. WIRIN (signed)

A. L. WIRIN

Attorneys for Plaintiff"

Mr. Wirin forwarded the aforesaid pleading to Judge Willis (trial judge) in a letter dated August 13, 1946, with the following explanation of his reasons for forgetting about the high seas and conceding that fishing is done in territorial waters. Said Mr. Wirin:

"A word of explanation: The enclosed Memorandum (of points and authorities) contains material not to be found in the plaintiff's memorandum in the Takahashi case, with respect to Sec.

990 of the Fish and Game Code, as affecting the right to fish in territorial waters, i.e., not in waters constituting 'high seas'.

After worrying about the problem considerably, I am satisfied that my efforts to limit the issues before this Court to the right to fish on the high seas, must be abandoned, if fishermen of Japanese descent are to have the right to fish, at least in the forthcoming sardine season, efficiently, and without the threat of criminal prosecution in the event they guess erroneously as to the precise point in the waters off the coast of California which divides 'territorial waters' from 'high seas'." (Parentheses supplied.)

In his original petition, Mr. Takahashi alleged that he engaged in the occupation of *commercial fishing in California* since 1915 (R. 1). This petition was verified by him, although the verification does not appear in the printed record. When the case was called for hearing in the trial Court, he abruptly changed his position to high seas fishing. After he got a judgment for a license to permit him to fish the high seas, he swung back to his original position and asked for and obtained (*ex parte*) a judgment for a license to fish territorial waters as well as those of the high seas.

At page 12 of his brief, the petitioner emphasizes a statement in Fish Bulletin No. 15 to the effect that "The fishermen, the fish, and the ocean currents pay little attention to these lines", that is, territorial ocean boundary lines. We heartily agree that Mr. Takahashi, being a fisherman himself, would pay little attention to the three mile seaward boundary of California.

It serves petitioner no useful purpose to urge that the so-called sovereign ownership doctrine has no application to the case at bar because only a small portion of the fishery lies within state waters. This is a novel point, raised for the first time in this Court. In the first place, there is no evidence in this case to support such a fact. Secondly, the assertion is erroneous. In this connection we quote in full a communication to us dated April 1, 1948, from Mr. Richard S. Croker, chief of the Bureau of Marine Fisheries, Division of Fish and Game of California. His statements are entitled to the same weight as any printed matter contained in Biennial Reports of the Fish and Game Commission referred to by petitioner for the reason that the authors of such printed matter occupied the same position as Mr. Croker as chief of the Bureau of Marine Fisheries. Mr. Croker says:

"My attention has been invited to certain representations contained in the brief of Mr. Takahashi, to be filed in the Supreme Court of the United States in support of his petition for a commercial fishing license in this State.

In that brief he states that 'a substantial if not a major portion of the California fish catch is taken' on 'the open sea' (see page eight). By reference to the open sea, he probably means the high seas, or in waters outside the State's territorial jurisdiction. At page thirteen of the same brief it is stated from Fish Bulletin No. 48 that '52 per cent of the sardine catch for the Monterey area occurred within three miles of shore, while 36 per cent of the San Pedro (Los Angeles) catch was attributable to the coastal

waters.' It is also stated that about 20 per cent of the catches for adult sardines off Orange and San Diego Counties are made within the three-mile limit.

It is difficult to determine the place, with any degree of accuracy, where the ocean fishes are caught for the reason that many of the fishermen themselves do not keep accurate records of their position while at sea, and themselves do not know or report accurately the places where the fish are caught. From what scientific data the Bureau of Marine Fisheries has available, and from studies made of the habits of the various commercial fishes of California, it is safe to say that approximately one-half of the sardines brought into California ports are taken within territorial waters of the State, and the remaining one-half are taken outside territorial waters or on the high seas. The same ratio applies to mackerel. The salmon catch occurs mostly inside territorial waters, approximately 90 per cent. On the other hand, tuna and albacore which in years gone by were taken in large quantities in territorial waters are now caught almost entirely on the high seas. In these cases the boats even travel to foreign countries or thousand of miles to catch the tuna. The lobster fishery is all inside territorial waters of the State; and the same applies to crabs and other forms of mollusks and crustaceans.

The principal species taken by fishermen operating out of southern California ports are sardines and mackerel.

It is my opinion that the large influx of commercial fishermen to California during the war

years has added to the current problem which exists as to sardines. At this writing the sardine fishery of California is threatened with extinction. For the last two years the catch has been at a seriously low level. Sardine fishing boats which normally operated out of San Francisco and the Monterey areas were obliged to go to southern California waters to prey upon the fishery there. As a result, practically all the sardines taken for the last season (1947-1948) were fish of younger year classes which had not reached the age at which migration to the north commences. Many were spawned in the early part of 1947, and were taken in the fall of that year and in the winter of 1948. As a result, this fishery has not had a chance to rehabilitate itself and it is quite probable that a blanket prohibition will have to be put on the entire take of sardines to protect it from extinction. During the 1947-1948 season, and during the sardine season for 1946-1947 the reduction and packing plants operating at San Francisco and Monterey were obliged in the main to get their fish by shipments from southern California by truck. This is a very wasteful and expensive way of carrying on the business, as the fish are subject to spoilage in transit.

Yours very truly,
 (SIGNED) RICHARD S. CROKER,
 RICHARD S. CROKER,
 Chief,
 Bureau of Marine Fisheries.

RSC:hn"

It thus appears that the major portion of California's fisheries is not limited to the high seas. Even so,

all indices of state sovereign ownership attach when fish are brought ashore from the high seas. *Bayside Fish Flour Company v. Gentry*, 297 U.S. 422, upheld a California statute placing a limitation on the use of sardines brought into this State even though from the high seas. This Court said (page 426);

"Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 39, 40, 53 L. ed. 75, 79, 29 S. Ct. 10."

To the same effect it was stated in *Mirkovich v. Milnor*, 34 Fed. Supp. 409, 412-413:

"The insurmountable difficulties attendant upon policing the waters of the state from the coast to the imaginary three mile limit, wherever fishing operations occur; the impossibility of distinguishing fish taken in state waters from those taken from without, or between vessels fishing within from those fishing beyond the state's limits; the consequent ease, with which fraud and deceit might be practiced by vessels delivering fish taken from the fisheries of the state to points outside the state on the pretext of operating solely beyond the three mile limit—these considerations alone justify the provisions of Section 1110 of the Fish and Game Code as a proper exercise of the police power of the State of Cali-

fornia, having reasonable relation to the object of their enactment, and reasonably calculated to render effective the state's power of control over the fish supply within its territorial waters."

And as stated in *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. (2d) 56 at page 61,

"The lawful act of fishing outside the three mile limit obviously affects the natural resources of this state within the three mile limit. California has no power to extend the operation of its laws beyond its maritime frontier, but when the impact of activities outside the three mile limit necessarily adversely affects the public policy of this state, within the three mile limit, the state has the power to take steps against the persons responsible for such activities when they come within the limits of its jurisdiction. This statute does not make punishable acts committed outside the jurisdiction of California. It operates only when boats which fish outside its jurisdiction (but whose acts adversely affect the interests of this state) come within this state's jurisdiction. As was said in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 426 (56 S.Ct. 513, 80 L. Ed. 772), in upholding a somewhat similar statute: " * * its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy." (See, also, *Silz v. Hesterberg*, 211 U. S. 31 (29 S.Ct. 10, 53 L.Ed. 75).)"

Similarly it was held in *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 Fed. (2d)

111 that the State may qualify the use made of fish brought in from the high seas in order to conserve the fish which are taken from its own waters.

Moreover, the concept of state sovereign ownership over the fishery resources adjacent to the coast has been extended by the proclamation of the President of the United States of September 28, 1945 (59 Stat. 885). In other words, by authorizing the establishment of conservation zones on the high seas, ownership of the fish on the high seas adjacent to the coast of the United States is asserted. It follows that such ownership would lie with the respective sovereign states because they, in turn, are the owners of the migratory fish which frequent their shores (see this brief, post).

We submit that the petitioner intends to and will fish where he finds them, irrespective of whether they are in territorial waters of California or waters of the high seas.

As it is impossible to distinguish between fish taken from within or without territorial waters, California may rightfully assert sovereign ownership over all fish brought to its shores by fishing boats and prohibit aliens ineligible to citizenship from fishing without violating the Fourteenth Amendment of the Federal Constitution (cf. *Lubetich v. Pollock*, 6 Fed. 2d. 237; see also pages 13, 15, 16 and 17, respondents' brief in opposition to petition for writ of certiorari).

FISHING IS NOT A COMMON OCCUPATION.

The dissenting opinion of Mr. Justice Carter of the Supreme Court of California defines fishing as a common occupation or as an ordinary means of livelihood and he refers to the *Encyclopaedia of Social Science*, Volume III, page 266, for support. A short quotation is given from that Encyclopaedia to the effect that fishing is one of man's earliest sources of food and is still one of the most important means of earning a livelihood (R. 53). The discourse in the Encyclopaedia under the heading of "Fisheries" reviews the history of fishing and fisheries from early times and concludes with the statement that improvements in the mechanics of the craft have hastened the exhaustion of the fisheries and hence have proved the need for regulation and conservation. It should be added that the vast increase in the number of fishermen have likewise hastened exhaustion and called for regulation to preserve the fisheries, such for example, as the action taken by California in limiting the number of persons eligible to tap its fishery resources.

- o Perhaps in early times fishing was a common occupation, but it has now become uncommon and restrictive. As pointed out in our previous brief, statutes limiting the number of persons to fish have repeatedly been upheld. The privilege of fishing has been extended to citizen-residents of a state, to non-resident citizens and to aliens and declarant aliens. Others have been constitutionally denied the privilege. Statutes prescribing different license fees for different classes

of persons have been upheld and these, together with the other things just mentioned, show beyond doubt that fishing is no longer a common occupation in which one may lawfully engage as opposed to the will of the state. Indeed, the state may prohibit fishing entirely, either for pleasure or profit. For example, years ago sturgeon were prevalent in California and were sold commercially. In order to protect the species from complete extermination, sturgeon now cannot be taken at all. (Section 725, Fish and Game Code). This section provides "Sturgeon may not be taken or possessed at any time." Similarly, striped bass at one time were open to commercial fishermen. Now, however, they ~~are~~ cannot be taken for such purpose and sold on the market (Section 696, Fish and Game Code). This section provides: "It is unlawful to buy or sell striped bass. The possession or transportation of striped bass for the purpose of sale is hereby prohibited." These restrictions take fishing out of the category of a common occupation.

Under what theory it can be claimed that fishing is a common occupation or an ordinary means of earning a livelihood is beyond perception. No authority has been cited in support thereof by the petitioner. The only thing he has done is to make an assertion to such effect and to parallel fishing with cooking and other forms of labor which may not be prohibited or restricted, at least, in aid of conservation.

Fishing differs from other forms of labor in that the fishery can become a wasting asset (cf. Mr. Croker's report, supra). The fisheries are a natural

resource, like minerals, timber, etc. While fishing is an ancient industry, so is mining. That industry runs back to the eighth man from Adam (Genesis, 4th chapter). Yet the United States has in effect declared that mining is no longer a common occupation in which all men engage. For only citizens of the United States and *declarant aliens* are permitted to tap the mineral resources of this country by location. (Title XXXII, Chap. VI, Revised Statutes of the United States, section 2319; 30 U.S.C.A., sec. 22). Thus aliens ineligible to citizenship, such as Mr. Takahashi, cannot exploit the mineral wealth of this nation. Mining as an industry is not a "common occupation" and, for that matter, neither is the business of exploiting the fishery resources of California.

That this Court in *Truax v. Raich* did not intend commercial fishing to be classified as a common occupation or other means of livelihood is indicated in *Ex parte Gilletti*, 70 So. 446; 70 Fla. 442. In that case Florida required all aliens and nonresident aliens to pay a \$10 license fee for the privilege of fishing or taking oysters. The petitioners, as aliens, were arrested and imprisoned for removing the oysters without a license. They sought habeas corpus. The Court denied the writ stating:

"As so construed and applied, the statutory provision does not violate organic or treaty right. The state may, without denying 'to any person within its jurisdiction the equal protection of the laws,' justly discriminate in favor of its citizens in regulating the taking for private use of the common property in fish and oysters found in

the public waters of the state, where such regulations have a fair relation to and are suited to conserve the common rights which the citizens of the state have in such fish and oysters as against aliens and non-residents of the state. The equal right of all persons who reside in a state whether citizens or aliens to labor therein does not include an equal right of an alien to participate in the common property and privileges that are peculiar to citizens. The statute does not purport to discriminate against aliens and nonresidents with reference to private property rights or the right to labor or to deal in fish and oysters after they lawfully become private property. See *Patterson v. Comm. of Penna.* 232 U. S. 138; *Truax v. Raich*, 239 U. S. 33."

**PETITIONER HAS NO "RIGHT" TO EARN HIS LIVING BY
COMMERCIAL FISHING IN CALIFORNIA.**

Under the heading of No. II petitioner claims that he has been denied the "right" to earn a living by commercial fishing solely because of his alienage and hence is denied equal protection of law. As previously pointed out, no one has the right to earn his living by commercial fishing against the will of the state (pages 18-20, respondents' previous brief). It is a privilege to engage in commercial fishing, and the privilege may be denied by the state in whole or in part at any time.

Under this heading the petitioner again quotes at length from *Truax v. Raich*, 239 U.S. 33 (pages 18, 19, 20 of his brief) holding in effect that a state can-

not deny lawful inhabitants the ordinary means of earning a livelihood solely because of their race. That case, as we previously indicated, expressly excludes from its purview such occupations as fishing, either for pleasure or profit. The *Truax* case cited *McCready v. Virginia*, 94 U.S. 391, which involved the planting and exploitation of oyster beds. This Court held such a privilege might be reserved by Virginia to its citizens alone. In other words, Virginia went further than California has done. Virginia excluded both non-resident citizens and all aliens from the privilege of engaging in the business of planting and harvesting oysters. California allowed all except ineligible aliens to hunt or fish.

Foster Fountan Packing Co. v. Haydel, 278 U. S. 1, does not help the petitioner. That case involved a statute of Louisiana which prohibited the exportation of shrimps if the hulls, heads and shells had not been removed. Its purpose was to prevent the shrimps from being processed or packed outside of Louisiana. It had been customary for the shrimps to be packed in Mississippi. The statute in that case obviously was not in aid of conservation. No limitation was placed upon the original take of the shrimps. Section 990 of the Fish and Game Code, however, pares down the number of persons who may take fish and thereby tends to conserve the fisheries by limiting the take.

Pavel v. Pattison, 24 Fed. Supp. 915, also is not in point. In that case Mr. Pavel owned 14,000 acres of swamp lands in Louisiana suitable only for trapping

alligators in summer and fur bearers in winter. The Court took notice of the fact that the alligators and the fur bearers had *no food value*, that they were *predators* and hence the restriction on their taking was not in aid of conserving a food source. The Court said (page 918) the situation in this respect is different from cases like *Geer v. Connecticut* wherein the hunting and capturing of game involved entirely matters of food and sport.

Patson v. Pennsylvania, 232 U.S. 138 upheld a statute prohibiting aliens from killing game and possessing arms. In discussing this case the petitioner says California does not base or claim that the denial of the fishing privileges to ineligible aliens is based on conservation. He states it is based on dislike and nothing more (page 22). This, of course, is but the idle conjecture of petitioner and his counsel.

Skiriotes v. Florida, 313 U. S. 69, cited at page 14 of petitioner's brief holds that the State may extend its penal statutes to its citizens upon the high seas even though there is no expressed declaration to such effect. If this is true, then California should be able to extend its penal statutes to persons residing within its jurisdiction, such as Mr. Takahashi, and to his operations while fishing on the high seas with as much propriety as it can to its own citizens. If California cannot enforce its statutes with respect to fish and game against resident aliens fishing on the high seas, then obviously its own citizens are discriminated against and placed in an unfavorable position to the resident alien who seeks the equal protection of Cali-

fornia law but claims that the State has no right to control his fishing activities on the high seas. In short, Mr. Takahashi would eat his cake and have it too.

**SECTION 990 OF THE FISH AND GAME CODE IS SUPPORTABLE
AS A CONSERVATION MEASURE.**

The petitioner contends that the 1943 and 1945 amendments to section 990 of the Fish and Game Code are not supportable as conservation measures; and that he is denied the right to fish because of his alienage. In the first place the 1943 amendment is not before this Court for consideration. As we indicated at page 34 of our previous brief, had the 1943 statute ever come before the Court it undoubtedly would have been considered in the light of the clear and present danger doctrine announced in *Korematsu v. United States*, 323 U. S. 214.


The 1943 amendment to section 990 prohibited the issuance of commercial fishing, sport fishing and hunting licenses to alien Japanese (Statutes, California, 1943, chapter 1100). This statute was approved by the Governor of California June 8, 1943. It was introduced in January of the same year. It should be borne in mind that at that time the *Korematsu* case had not been decided by this Court. It was decided December 18, 1944. In other words, California did not know whether the military orders relating to Japanese concentration would be upheld. For all California knew the Japanese might have been returned. It cannot be

doubted that in 1943 there was a clear and present danger not only to California but to the United States as well from the operation of Japanese fishing boats. Moreover, if the Japanese had been returned to California during the war, a statute granting them hunting privileges (with the right to carry a rifle) would be manifestly absurd.

The contention of the petitioner at page 25 of his brief that the 1943 amendment was merely a new outburst of anti-Japanese hysteria is not sound. If California was hysterical in 1943 it had good reason to be. This applies to the entire nation.

The petitioner falls back on the argument that the 1945 amendment was merely a continuance in effect of the 1943 amendment in that the Japanese were singled out by description in 1945 rather than by name. This contention rests upon his assumption that Japanese were the *only* ineligible aliens who ever fished in California waters. The petitioner asked the trial Court to take judicial notice of this. The Supreme Court of California correctly held, and the dissenting opinion does not question, the holding, that the trial Court erred when it assumed judicial knowledge that Japanese were the only ineligible aliens who fished in California waters and such was known to the legislators in 1945.

The petition is devoid of any allegation that Japanese were or are the only aliens ineligible to citizenship who ever engaged in commercial fishing or any kind of fishing in California. Such an allegation would



have been denied. Nevertheless after this case had been argued, briefed and submitted to the Supreme Court of California, the petitioner presented to that Court Fish Bulletins Nos. 49, 57, 58 and 59 together with his analysis thereof. More of these Bulletins are referred to and analyzed in his current brief. We had and still have no objection to a consideration of any statistical information compiled by the Fish and Game Commission with respect to persons holding commercial fishing, hunting, or angling licenses.

Apparently dissatisfied with the statistical data obtained and with his analysis thereof, the petitioner called for the deposition of Miss Geraldine Connor as his witness and submitted written interrogatories to her in the companion case of *Tsuchiya v. Fish and Game Commission*.² The petitioner's questions are numbered 1 to 11 inclusive and the respondents proposed cross-questions 12 to 16:

Still dissatisfied with the results of the deposition, the petitioner through counsel undertook an independent examination of the records of the Fish and Game Commission pertaining to commercial fishing license applications. This investigation was made by Mr. Howard Goldstein, an employee of the petitioner or of his southern California counsel. We believe he is the same Howard Goldstein who is referred to at page

²The *Tsuchiya* case is referred to at page 24 of respondents' brief in opposition to writ of certiorari. By stipulation the testimony taken in that case was incorporated into the record of the case at bar (R. 25-29). That case and this case are identical except for the relief prayed.

28 of petitioner's current brief. Mr. Goldstein's investigation was not made jointly with respondents or their representatives. Hence we are not in a position to vouch for the authenticity of his work and we seriously question the accuracy and competency of his "Survey" which was made at the instance and request of petitioner. Mr. Goldstein's conclusion that other than alien Japanese only three fishermen (two Koreans and a Guamese) were licensed to fish commercially between 1930 and 1944 (petitioner's brief, pages 27, 28) is not only questionable but certainly is not binding on respondents. Mr. Goldstein's "Guamese" happens to be a Mr. Joe Santos Sr. who was born in Guam. Goldstein concludes from that fact alone that Mr. Santos is ineligible to citizenship. From his name, however, it would appear that Mr. Santos is of Portuguese ancestry, in which case the mere fact he was born in Guam would not preclude him from citizenship. One of Mr. Goldstein's "Koreans" is a Mr. Hyeng Kim whose application shows he applied for "first" citizenship papers. The magazine "Pacific Citizen" is the official publication of the Japanese American Citizens League and is not available at any public library in the San Francisco bay area.

None of the records of the respondents give or purport to give the citizenship eligibility of applicants for commercial fishing licenses. The statistical data refers to nativity alone. Herein, perhaps, lies the principal point which Mr. Goldstein and the petitioner have overlooked. In short, nativity does not determine eligi-

bility to citizenship. Such eligibility is determined by race, not by nativity or place of birth (The Nationality Act of 1940, sec. 302 et seq. 54 Stat. pages 1137, 1140). Thus a person may show, for example, British nativity and yet be ineligible to citizenship. This is demonstrated by Miss Connor's answer to petitioner's question number 9 (R. 27-28).

How or under what theory the trial Court acquired such judicial ken is unknown to respondents, particularly as they themselves, as the licensing agents, are unaware of such facts, if indeed they are the facts. Despite the special knowledge on the subject which may be imputed to them, respondents are unable to say that Japanese were the only ineligible aliens who commercially fished in waters of this state or on the high seas adjacent to its coast.

Furthermore, it should be noted that the trial Court limited its judicial knowledge of the commercial fishing by ineligible aliens (Japanese) to "ocean waters bordering on California" (R. 17). What about inland waters such as the Sacramento and San Joaquin Rivers and San Pablo, Suisun and San Francisco Bays? Those waters have been fished commercially for years. Can it be said that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in such inland waters? The respondents do not think so and question the power of the courts to take judicial knowledge thereof, or knowledge that Japanese were the only ineligible aliens who fished in the ocean waters adjacent to this State. In California the

three material requisites of the assumption of judicial knowledge are (1) the matter must be of common and general knowledge, (2) it must be well established and authoritatively settled, that is, not doubtful or uncertain and (3) it must be within limits of the Court's jurisdiction (10 Calif. Juris. 693, sec. 21). Possibly the latest expression on this subject by California Courts is to be found in *Berry v. Chaplin* 74 Cal. App. 2d. 669. In that case the Court refused to take judicial knowledge that Charles Chaplin (of the moving picture industry) is a man of wealth and opulence.

Another problem arises in this case in regard to the assumption of judicial knowledge that the commercial fishing activities of ineligible aliens were limited to Japanese. That problem comes from a consideration of the 1945 amendment (chapter 181) as a whole. It has been pointed out in our previous brief (page 5) that the chapter amended not only section 990 but also sections 427 and 428 of the Fish and Game Code. These last two sections relate to hunting and sport fishing licenses. To reach the conclusion of the trial court that by the 1945 amendment "the Legislature intended * * * to eliminate alien Japanese * * * by means of description rather than by name" (R. 17), would require the assumption of additional judicial knowledge that Japanese were the only ineligible aliens who hunted or fished for pleasure in California. Obviously, this would impose too great a tax upon the imagination. The intent of the legislators of 1945 in enacting chapter 181 should be gathered from the whole chapter and not just from section 3 thereof relating

to commercial fishing licenses (*Robinson v. Mitchell*, 159 Cal. 581). Consequently it cannot be said that the 1945 amendment (chapter 181) was aimed at the elimination of alien Japanese by description rather than by name in the absence of knowledge that Japanese were the only ineligible aliens who hunted or fished for pleasure or profit in California. Commercial fishing activities cannot be considered alone if judicial knowledge is to be invoked (cf. *Hellmich v. Hellman*, 276 U. S. 233).

The Report of the Fact Finding Committee of the Senate cited on page 26 of petitioner's brief was not admitted in evidence in the case nor for that matter would it be admissible as competent evidence. The motives which prompt the legislature to enact a law cannot be made the subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law (*Plum v. State Board of Control*, 51 Cal. App. 2d, 382, 124 Pac. 2d 891).

Moreover, the Report represents the views of only five of the legislators of 1945. That year there were 120 members of the State legislature, of which 40 were senators and 80 were assemblymen. When the 1945 amendment reached the Assembly (that is, the lower house) it was referred to the Committee on Fish and Game and that Committee considered the bill, solely from the point of conservation by reducing the number of persons who are preying upon the fishery reserves of this State. In support thereof we quote below a communication from the Honorable Thomas M. Irwin, a member of the California Legislature.

January 16, 1948

Hon. Fred N. Howser
Attorney General of California
600 State Building
San Francisco 2, California

Dear Sir:

I am a member of the Assembly of the California Legislature and was such during the session of 1945. During that session I was a member of the Assembly Committee on Fish and Game to which all bills relating to fish and game were referred. Senate Bill No. 413 was introduced in the Senate January 23, 1945. It passed that House and was referred to the Assembly Committee on Fish and Game on April 4, 1945. That Bill passed the Assembly and was signed by the Governor and became Chapter 181, Statutes of California of 1945.

I was present at the meetings of the Assembly Committee on Fish and Game at the time when Senate Bill 413 was discussed. The Committee did not consider the Bill from any constitutional aspect but reviewed and considered it solely from the standpoint of conservation of fish and game. It was the consensus of opinion of this Committee of 17 members that by further increasing the number of persons ineligible to hunt or fish for pleasure or profit, California wildlife would be the better conserved. The disastrous results to this State of overfishing by commercial fishermen during this and the past few years, particularly in respect to sardines, has shown the wisdom of the action of the Legislature in passing Senate Bill No. 413 and it is possible that still more per-

sons may have to be denied the privilege if California's commercial fisheries are to survive.

Yours very truly,
(Signed) Thomas M. Erwin

If the Report of the Senate Committee is entitled to consideration, the statements of Mr. Irwin are entitled to equal weight.

At page 29 of his brief the petitioner has prepared some tables purporting to have been compiled from certain Fish Bulletins. The figures do not tell the ratio between alien Japanese commercial fishermen and other aliens. For this reason we have set below a table which should be of greater service to the Court in this respect. The table is compiled from Fish Bulletins 57, 58, 59 and 63.

License year	Total aliens (exclusive of de- clarant aliens)	Japanese	Nativity not given
1939-1940	1579	807	153
1940-1941	1395	470	129
1941-1942	1343	371	40
1942-1943	414	-----	24
1943-1944	528	-----	117
1944-1945	574	-----	103
Totals for first 3 years		1648	322

The percentage or ratio of alien Japanese commercial fishermen to other aliens whose nativity was not given (presumably ineligible to citizenship) for the foregoing first three license years is approximately 89 to 11. This does not justify the assumption of judicial

knowledge that alien Japanese alone fished commercially from the waters of this state.

Fish Bulletin No. 57, page 18 shows that out of a total of 1579 alien fishermen (exclusive of declarant aliens) in the 1939-1940 license year 807 were Japanese and 153 were grouped as all other foreign born without specific reference to nationality. Fish Bulletin 58, page 25, shows that out of a total of 1395 alien commercial fishermen other than declarant aliens licensed for the year 1940-1941, 129 were persons whose nativity was not known and 470 were alien Japanese. The figures with respect to Japanese is computed by subtracting 289 United States born Japanese (page 25) from a total of 759 Japanese commercial fishermen (page 24).

For the year 1941-1942 Fish Bulletin No. 59 reveals that there were 40 aliens whose nativity was not recorded out of a total number of 1343 alien fishermen other than those seeking citizenship. Of the latter number apparently 371 were alien Japanese (699 minus 328, pages 22 and 23). For the license year 1942-1943 there were 24 aliens whose nativity was not recorded out of a total of 414 non-declarant alien fishermen (p. 23). There were no Japanese fishermen that year.

In Fish Bulletin No. 63 (page 36), it is shown that out of the total number of 528 alien fishermen (exclusive of declarant aliens) in the 1943-1944 license year, 117 did not specify citizenship or nativity. For the 1944-1945 license year the ratio was 574 to 103. It

should be noted that in the last three license years mentioned there were no Japanese fishermen, yet the number of licentiates increased.³

Quotations from the Biennial Reports of the Division of Fish and Game which are set forth in petitioner's brief are mere statements of statistical facts and information. The petitioner urges that because the fishing industry of California increased remarkably during the war years, it shows that California is well satisfied with such growth and desires it to be continued. Hence they urge that the reduction in the number of fishermen is not germane to conservation and belies the argument that a reduction in the number of commercial fishermen is desired for such a purpose. The fallacy of such an argument lies in the fact that the Biennial Reports show conditions as they exist and not conditions to be desired. Briefly the situation in California with respect to its fisheries is this. The number of commercial fishing licenses sold in California increased from 7,665 to 12,312 between the license years 1937-1938 and 1946-1947 (Fish Bulletin No. 67, page 32). This was due to a persistent demand for food particularly during the war years. This demand stimulated an influx of fishermen. Despite the large increase in the number of fishermen the overall catch for 1945 dropped (Fish Bulletin No. 67, page 7) and in fact was lower than it was in the previous 11 years. The 1946 catch showed a still further decrease of more than a quarter million pounds (Fish Bulletin

³The Fish Bulletins referred to will be lodged with the clerk of the Court.

No. 67, page 6 and 7). In other words, we here have a situation where the number of commercial fishermen is increasing yet the overall catch is decreasing. The explanation of this lies in the obvious fact that the fisheries are being exhausted. In Fish Bulletin 67 at page 7 reviews the decline in the overall take of fish and then says:

"The explanation of the foregoing lies in the fact that sardines have dominated the catch for 20 years, averaging about 75 percent of all landings. Therefore the trend of the sardine catch determines the trend of the total catch, thus obscuring the tenor or the remaining fisheries. The decline in the 1945 and 1946 total catches was due to the failure of the sardine fishery which yielded a total lower than any year since 1933."

The catch in 1947 in California presents a still gloomier picture.⁴ It appears that the sardine fishery of California upon which the other fisheries depend is threatened with extinction. Sardine fishing boats normally operating out of Monterey and San Francisco now travel to southern California ports to catch the remaining sardines. The fish are trucked from Los Angeles to northern ports (a distance of approximately 500 miles) in order to supply the northern packing plants. This is not only economically unsound but in many instances results in a waste of the fish themselves as they spoil before reaching the plants. It is obvious therefore that any reduction in the number of fishermen tends to conserve if not

⁴See the communication from Mr. Richard Croker, this brief, supra.

save entirely the sardine fishery of California and the fisheries dependent upon sardines from complete extinction. Therefore when the petitioner states at page 32 of his brief that the authorities of California look with favor upon the increase in the number of ocean fishermen he is wandering far afield.

It is a rule of long standing that the United States Supreme Court will accept the construction placed on a state statute by the highest court of that state. (*S.R. A. Inc. v. Minn.*, 327 U. S. 558; *International Harvester Co. v. Wisconsin*, 322 U. S. 435; *Prince v. Mace*, 321 U. S. 158; *Supreme Lodge etc. v. Meyer*, 265 U. S. 30; *Morehead v. N. Y., ex rel. Tilapido*, 298 U. S. 587). The highest court in California has construed section 990 of the Fish and Game Code as being an enactment in aid of conservation, that conservation was the aim and purpose of the statute and that the reduction in the number of persons eligible to hunt and fish bears a reasonable relation to the object sought to be obtained, namely the conservation of the State's commercial fisheries as well as the conservation of its game and sport fishes. In the light of these decisions we submit that this construction should be followed by this Court.

The construction given by the highest state Court is conclusive on the United States Supreme Court where the question involved is whether such a statute is repugnant to the Federal Constitution (*Morehead v. New York*, 298 U. S. 587; *American Mfg. Co. v. St. Louis*, 250 U. S. 459; *Mackay Tel. & Cable Co. v. Little Rock*, 250 U. S. 94; *International Paper Co. v.*

Massachusetts, 246 U. S. 135; *Hendrickson v. Apperson*, 245 U. S. 105; *Pacific Livestock etc. v. Lewis*, 241 U. S. 440; *Price v. Illinois*, 238 U. S. 446; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651; *Atlantic Coastline Ry. Co. v. Georgia*, 234 U. S. 280).

Committee reports cannot be considered where the words of a statute are clear (*Helvering v. City Bank etc. Co.*, 296 U. S. 85, 89).

Lastly, the petition does not contain any allegation that section 990 was not enacted in aid of conservation. In the absence of such an allegation, the courts presume that the law was passed to conserve and foster the fish and game of the state (*Thomson v. Dana*, 52 Fed. 2d 759, aff. 285 U. S. 529).

SECTION 990 OF THE FISH AND GAME CODE IS NOT REPUGNANT TO STANDARDS ESTABLISHED BETWEEN THE UNITED STATES AND OTHER NATIONS.

Petitioner indulges in lengthy argument to the effect that section 990 of the Fish and Game Code is void because it is contrary to certain pronouncements contained in articles of the United Nations Charter, in declarations set forth at Geneva in December of 1947 and in resolutions and articles adopted at conferences between nations of the Americas. All of those articles and resolutions appear to follow a common line. They declare that everyone is entitled to human rights and freedoms without distinction as to race, sex, language or religion. The petitioner has not called attention to anything which announced that California or any

other state of the United States may not conserve their fisheries by prohibiting fishing entirely or by limiting the privilege to its own citizens, to non-resident citizens or to any group of aliens.

The United States has asserted, as indicated in our previous brief (see pages 36-39), the right to protect the fisheries on the high seas adjacent to its coast. At a conference of coastal states held in Washington, D. C., in May of 1946 the State Department of the United States recognized the fact that the sovereign states are the ones who are entitled to and should establish such conservation zones on the high seas off their respective shores. This follows the theory that the title and ownership of the fisheries has always been in the sovereign states.

The *Tidelands* case (*United States v. California*, 332 U. S. 19) does not help the petitioner. As indicated in our previous brief (page 36 et seq.) it is significant that the assent of Congress to the compact between California, Oregon and Washington in relation to the fisheries was given *after* the *tidelands* decision. This manifests lack of Federal intent to assume any position in the coastal fisheries. Moreover, the *tidelands* decision distinguished but did not overrule such cases as *Manchester v. Massachusetts*, 139 U. S. 240, *The Abby Dodge*, 223 U. S. 166, or the *Skiriotes* case, *supra*.

Finally, the statute in question does not impose any burden on foreign or interstate commerce (*Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 426).

CONCLUSION.

For the foregoing reasons and those specified in our previous brief, it is urged that the decision below should be affirmed.

Dated, San Francisco, California,
April 5, 1948.

Respectfully submitted,

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Deputy Attorney General of the State of California,

Attorneys for Respondents.

